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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DEVON MAURICE McCRAW, Defendant and Appellant.	B199555 (Los Angeles County Super. Ct. No. YA060874)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed.

Marleigh A. Kopas, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters, Steven D. Matthews and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Devon Maurice McCraw, appeals from the judgment entered following his conviction, by jury trial, for burglary (6 counts); receiving stolen property (5 counts) and possession of a firearm by a felon, with criminal street gang and prior serious felony conviction enhancements (Pen. Code, §§ 459, 496, 12021, 186.22, 667, subd. (a)-(i)).[1] McCraw was sentenced to state prison for a term of 205 years to life.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we find the evidence established the following.

Between December 30, 2004, and February 5, 2005, six homes were burglarized in Torrance. The stolen items included, among other things: a 4 Runner truck, a safe containing 10 guns, other handguns, video games, hundreds of DVDs, $30,000 worth of savings bonds, a coin collection and a laptop computer.

On February 7, 2005, Torrance Police Department detectives began surveilling defendant McCraw at a house in Inglewood. There was a 1998 Oldsmobile parked in front of the house and an inoperable Cadillac in the driveway. That afternoon, McCraw was seen driving the Oldsmobile into the Jordan Downs housing project on Grape Street. When McCraw returned to the Inglewood house, Jayshon Ware and Davshown Hennes were in his car.

Later that afternoon, McCraw drove to a GameStop store in Inglewood. Ware and Hennes apparently went with him. GameStop sells computer software, video games and DVDs. The store allows customers to trade in video games and

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[1] All further statutory references are to the Penal Code unless otherwise specified.

DVDs for store credit or cash. That afternoon, McCraw traded 120 DVDs for $290.

The next day, the detectives spoke to the manager of the GameStop store and examined the DVDs. Some of them were labeled with the name of one of the Torrance burglary victims.

McCraw, Ware and Hennes were arrested. After he was booked and detained, McCraw made a telephone call to Ware from the police station. During the call, which was recorded by the police, McCraw and Ware discussed the burglaries. McCraw said the police would only be able to charge him with receiving stolen property, not burglary, because he had not left any fingerprints at the victims' homes.

Inside McCraw's Oldsmobile, police found three 27-inch flathead screwdrivers, gloves and flashlights. A detective testified how these items could be used to commit burglaries: the screwdrivers to pry open windows or doors, the flashlights to illuminate night scenes, the gloves to prevent fingerprints. Police also found a video game belonging to one of the burglary victims, a digital camera belonging to another victim, and a set of keys to the Cadillac. Inside the Cadillac, police found more stolen items, including guns, the $30,000 worth of savings bonds and part of the coin collection. Still more stolen property was found inside the Inglewood house: DVDs, an X-Box system and a laptop computer.

Officer Charles Garcia testified as a gang expert regarding the Grape Street Crips. This gang controls the Jordan Downs housing project. In January 2005, McCraw told Garcia he was a member of the Grape Street Crips and that he belonged to the Baby Locs clique.

Officer Jeffrey Bright also testified as a gang expert. The Grape Street Crips gang, with about 2,000 to 2,500 known members, was located mainly in Jordan Downs, although some members lived elsewhere. The gang's primary criminal activities included burglaries, robberies, the sale of drugs, drive-by shootings and murders. Most of these crimes were committed in groups.

Fellow gang members help each other commit crimes because that is a way to gain status within the gang. The Grape Street Crips contained several smaller cliques, one of which was the "Baby Locs . . . a bunch of the youngsters trying to come up within the gang." One of the ways to move up in the gang is to commit burglaries. The money brought into the gang by the commission of such crimes is used for bail expenses and to buy guns and drugs.

Bright knew that Hennes was a member of the Grape Street Crips, but he did not know McCraw. Based on a hypothetical question reflecting the evidence in this case, Bright opined that McCraw had committed the charged offenses for the benefit of his gang.

McCraw did not put on any evidence.

CONTENTIONS

1. There was insufficient evidence to support the criminal street gang enhancements.

2. The trial court erred by refusing to dismiss any of McCraw's Three Strikes priors.

3. McCraw's sentence constituted cruel and unusual punishment.

DISCUSSION

1. *Evidence was sufficient to sustain the gang enhancements.*

In connection with McCraw's convictions for burglary, receiving stolen property, and possession of a firearm by a felon, the jury found true the alleged criminal street gang enhancements. McCraw contends there was insufficient evidence to support these enhancements. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal

standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

As we explained in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457, "Section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang." A gang expert may testify on the ultimate question of whether the defendant was acting for the benefit of a gang. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 507-509.)

b. *Background.*

The prosecutor asked Officer Bright, the gang expert, how someone could get ahead in the Grape Street Crips. Bright answered, "By putting in serious work such as 459's [i.e., burglaries]. The more work you put in, the more hard core work you put in, the more street credit you have within the gang." The following colloquy occurred: "Q. If you are bringing in a lot of money and spreading it out within the gang, is that a good thing? [¶] A. Yes. [¶] Q. What is this money

used for within the gang? [¶] A. [Y]ou can bail other homies out of jail when they get arrested. You can buy more guns, you can also buy more narcotics . . . and turn that around and make even more money."

The prosecutor asked Bright the following hypothetical question: "Now, if I can ask you to assume that this defendant committed 7 burglaries and, further, that when police searched locations in connection with Mr. McCraw, they found numerous items belonging to different victims, that Mr. McCraw was seen going into a Game Stop and . . . selling used DVD's and games and receiving $290 . . . , that upon his arrest . . . Mr. McCraw had in his possession property belonging to one of the victims to a burglary, that he had about $1,400 in cash on him and a cohort had about $1,900 cash on his person, would you have an opinion as to whether or not the crimes of burglary or receiving stolen property and a felon in possession of a firearm were committed for the benefit or in association with or at the direction of a gang, in this case, being the Grape Street Crips?"

Bright answered that in his opinion the crimes would have been committed for the benefit of the gang because such activity "provides cash to the gang. Basically money is power. With the money, you can buy hits, you can buy drugs and you can buy guns which gives you protection, but with that protection you have status on the street and no other gangs are going to bother you with that."

On cross-examination, defense counsel asked Bright: "Now, you said that gang members commit crimes for the benefit of the gang. Let's just assume hypothetically . . . that I am a gang member. Are you saying that if I go and steal, you know that I am stealing for the benefit of my gang?" Bright replied, "I can't always say 100 percent of the time that you are doing that, no." Asked if it was "possible that even if you are a gang member that you might be committing a crime for the benefit of your immediate family?", Bright acknowledged, "It is possible." The following colloquy then occurred:

"Q. [L]et's say I have two kids; you might want to know that about me before [you] come to a conclusion about whether I committed this crime for the benefit of the gang, as opposed to for my immediate family?

"A. I can't say in my opinion that the kids are actually a factor in that opinion.

"Q. Do you know if my client has kids? Did you check to find out if he has kids?

"A. I don't know your client at all, sir."

There was no evidence McCraw had committed any of the charged crimes for the benefit of his family.

c. *Discussion.*

Citing *People v. Killebrew* (2002) 103 Cal.App.4th 644, McCraw argues Officer Bright's testimony could not have provided sufficient evidence to sustain the gang enhancements because his expert opinion impermissibly addressed McCraw's subjective intent, and that "under the guise of a hypothetical question, Officer Bright testified that *appellant* had the subjective intent to commit these crimes for the benefit of the Grape Street Crips." McCraw properly notes a gang enhancement finding requires more evidence than that the defendant was a gang member when he committed the charged crimes.

McCraw's reliance on *Killebrew* is misplaced. "A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence. [Citation.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.) This is true even if the gang expert's opinion in effect answers an ultimate issue in the case. "Appellant's reliance on *Killebrew* for a contrary conclusion is misplaced. In *Killebrew*, in response to hypothetical questions, the People's gang expert exceeded the permissible scope of expert testimony by opining on 'the subjective *knowledge and intent* of each' of the gang members involved in the crime. [Citation.] Specifically, he testified that each of

the individuals in a caravan of three cars knew there was a gun in the Chevrolet and a gun in the Mazda and jointly possessed the gun with everyone else in the three cars for mutual protection. [Citation.] *Killebrew* does not preclude the prosecution from eliciting expert testimony to provide the jury with information from which the jury may infer the motive for a crime or the perpetrator's intent; *Killebrew* prohibits an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial." (*Id.* at pp. 1550-1551.)

As our Supreme Court has stated: "Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons. . . . [U]se of hypothetical questions is proper." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3.)

In this case, the prosecutor framed the hypothetical question in terms of McCraw himself. Nevertheless, because Bright already had testified he was not personally acquainted with McCraw, it was apparent Bright was answering the hypothetical question in terms of a typical member of the Grape Street Crips. Moreover, it was defense counsel who then tried, unsuccessfully, to switch the focus from the hypothetical gang member to McCraw himself by asking, "Do you know if my client has kids? Did you check to find out if he has kids?", to which Bright replied, "I don't know your client at all, sir."

We also disagree with McCraw's assertion that, apart from Bright's expert opinion, there was no evidence the crimes were gang-related except for the fact McCraw and Hennes belonged to the Grape Street Crips and that McCraw occasionally visited the Jordan Downs housing project. During the telephone call recorded at the police station, Ware discusses a search warrant that was left at Hennes's house in Long Beach and says the warrant affidavit named all three of them. When McCraw asks if the police found the rifles that were in the trunk of the Cadillac, Ware tells him the police "took the whole car." When McCraw

suggests the police won't be able to find the guns because he hid them "in the back of my speaker," the following colloquy occurred:

"[Ware]: But they could, if they open your trunk, they gon' move the speaker.

"McCraw: Yeah.

"[Ware]: So anyway it go, they got everything."

McCraw then says, "Gang banging, man, aw, I don't even feel that shit no more, nephew,"[2] and "this shit make a nigga not even want to bang no more, I swear to God."

McCraw's comments show that the charged crimes were related to his gang activity. We conclude there was sufficient evidence to sustain the gang enhancement findings.

2. *No error in refusing to dismiss Three Strikes priors*.

McCraw contends the trial court abused its discretion by refusing to dismiss, under the authority of *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, either one or both of the prior serious felony conviction findings used to impose a Three Strikes sentence. This claim is meritless.

The factors to be considered in ruling on a *Romero* motion were set forth in *People v. Williams* (1998) 17 Cal.4th 148, 161: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit,

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[2] McCraw is Ware's uncle.

in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies."

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 376-377.)

Here, there is nothing in the record showing the trial court was unaware of its discretion under section 1385 or failed to exercise that discretion when denying the *Romero* motion. Indeed, McCraw acknowledges the trial court was aware of its section 1385 discretion and expressly found McCraw did not fall outside the scope of the Three Strikes scheme. The trial court ruled: "And I have to consider his record, the recent nature of the past offenses, the current offenses which were multiple and sophisticated, and he does appear to be learning [how to avoid apprehension by wearing gloves while perpetrating a burglary] and he has a history of some violence, too. So taking all that into consideration, I don't think that granting this would be in the spirit of *Romero*. That's not what this was intended to be. [¶] If he had taken a bike from a porch and it was one offense, maybe that might help your argument a little bit, but not with what I heard during the trial. So your [*Romero*] motion is denied."

According to the probation report, McCraw's criminal record included the following: a 1996 juvenile adjudication, from when McCraw was 13 years' old, for vehicle taking; a 1997 juvenile adjudication for robbery; a 1997 juvenile adjudication for burglary; a 1998 juvenile adjudication for vehicle taking; and, two 1999 adult convictions for burglary. During one of the 1999 burglaries, McCraw threatened the victim with a knife.[3] McCraw was last paroled on October 10, 2002. Between the time he was paroled and his commission of the current offenses, McCraw was convicted of possessing less than an ounce of marijuana (in 2003), and twice for driving with a suspended license (in 2004).

Given McCraw's overall record and his recidivism, he has been committing serious crimes since he was 14 years' old, the trial court had a sufficient basis for denying his *Romero* motion. (See *People v. Strong* (2001) 87 Cal.App.4th 328, 338 ["the overwhelming majority of California appellate courts have reversed the dismissal of, or affirmed the refusal to dismiss, a strike of those defendants with a long and continuous criminal career."]; see also *People v. Carmony, supra,* 33 Cal.4th at p. 378 [" '[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' "].)

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[3] According to the probation report, these were two unrelated burglaries: "On October 29, 1999, victim's home was burglarized. Victim had inadvertently left the kitchen window open. Victim found that a filing cabinet had been pried open and jewelry and money were stolen. On November 14, 1999, another victim was awoken by the sound of breaking glass. When she went to her living room to investigate, she was confronted by a suspect who was holding a seven-inch kitchen knife and demanding her money. The victim fell to the ground and covered her head and began to cry indicating she had no money. Suspect had ransacked the entire house taking jewelry, money and victim's purse. Fingerprints found at both locations positively linked the defendant to the crimes."

In sum, we conclude the trial court did not abuse its discretion when it denied McCraw's *Romero* motion because it was not "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony, supra,* 33 Cal.4th at p. 377.)

3. *McCraw's sentence did not constitute cruel and unusual punishment.*

McCraw contends his sentence of 205 years to life constitutes cruel and unusual punishment under both the California and the United States constitutions. He argues the sentence is disproportionate to the nature of his offenses and the degree of his culpability, excessive when compared to the punishment imposed for more serious offenses, and "substantially longer than [his] possible life span." (See *People v. Dillon* (1983) 34 Cal.3d 441, 477-482; *In re Lynch* (1972) 8 Cal.3d 410, 423-424.) This claim is meritless.

The length of the sentence alone does not warrant relief. (See *Harmelin v. Michigan* (1991) 501 U.S. 957 [115 L.Ed.2d 836] [mandatory sentence of life without possibility of parole for possessing 650 grams of cocaine did not violate Eighth Amendment].) California's Three Strikes law is not so disproportionate that it violates the prohibition against cruel or unusual punishment. (*Ewing v. California* (2003) 538 U.S. 11, 25-31 [155 L.Ed.2d 109].) "When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice. To the contrary, our cases establish that 'States have a valid interest in deterring and segregating habitual criminals.' [Citations.] . . . Recidivism has long been recognized as a legitimate basis for increased punishment. [Citations.]" (*Id.* at p. 25.)

The fact McCraw's sentence might effectively be for life without possibility of parole does not render it unconstitutional. (See *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382-1383 [sentence of 115 years plus 444 years to life not unconstitutional]; *People v. Ayon* (1996) 46 Cal.App.4th 385, 396, disapproved on other grounds by *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10 [sentence of 240 years to life not unconstitutional].)

McCraw's sentence did not constitute cruel and unusual punishment.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.